Petition

81-256

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RICHARD A. MOORE, Petitioner

v.

DAVID SCURR and THE ATTORNEY GENERAL OF THE STATE OF IOWA, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a finding of competency to stand trial at the outset of the trial conclusively establishes a criminal defendant's mental capacity to waive his 6th Amendment right to be present in the Court room.

2. Whether this Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970) should be updated and clarified to prevent inconsistent lower court decisions.

3. Whether the decision below violates the long established principles of federal court review in habeas corpus proceedings.

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PETITION OF WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

The Petitioner, Richard A. Moore, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 8, 1981.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Iowa, reported at 494 F.Supp. 1042 (S.D. Iowa 1980), appears in the appendix hereto. The opinion of the Court of Appeals, reported at 647 F.2d 854 (8th Cir. 1981) also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 8, 1981. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, 6th Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

United States Code, Title 28, § 2254:

> (d) In any . . . application for a Writ of Habeas Corpus . . . a determination . . . made by a state court . . . shall be presumed to be correct, unless . . . (8) the Federal court on a consideration of . . . the record as a whole concludes that such factual determination is not fairly supported by the record.

STATEMENT OF THE CASE

Mr. Moore was charged with first degree murder in connection with the death of his wife. The deceased was found near an exit on Interstate 80 and had been shot twice, once in the head and once in the back. An autopsy later disclosed that the deceased had previously undergone a sex change operation.

Shortly after commencement of the trial, Mr. Moore attempted to enter a guilty plea, stating to the court that he was an undercover agent for the Denver Police Department, that he had been instructed to kill his wife and that he had killed others on many different occasions. Following this attempted guilty plea, the Court ordered a competency hearing to determine Mr. Moore's competency to stand trial. After hearing evidence on the issue, a specially selected jury returned a verdict that Mr. Moore was competent to stand trial. The trial then commenced, with Mr. Moore relying upon an insanity defense.

On the fifth day of the trial, Mr. Moore assulted the jailer who was transporting him from the Courthouse to the jail. As a result of this incident, the trial court ordered that Mr. Moore be shackled, with a body belt and hand cuffs, for the remainder of the trial.

On the seventh day of trial, on two occasions, Mr. Moore interrupted the Court proceedings with brief vocal statements, some directed at the Court and others at the witness who was then testifying, Dr. Paul Loeffelholz.

The first of these disturbances appears in the trial transcript at pp. 799 and 800:

Q. "What, if any, was Richard Moore's response when he was told that you didn't believe him?

A. He became somewhat glum when he got those messages, irritable, demanding and made threats, and within a short time was demanding his discharge and if he didn't get discharged, he would take a hostage and leave.

THE DEFENDANT: You're a liar."

Several minutes later, counsel for Mr. Moore requested a recess and the following colloquy took place:

"MR. CHALUPA: Your Honor, may we have a recess at this time?

THE DEFENDANT: I think — — take this Court and shove it.

THE COURT: Members of the jury, we will be at recess until further notice."

The second disturbance by Mr. Moore, also minor, is reflected in the trial transcript at pp. 803 and 804 and is the disturbance which ultimately lead to his exclusion from the Court room:

Q. "Doctor, from the background I have given you earlier, in your testimony Mr. Moore has stated on repeated occasions that he works for the Denver Police Department and these —

THE DEFENDANT: Martin down there, Lt. Callig down there, too.

THE COURT: Mr. Moore, will you please

remain silent. We will maintain order during ——

THE DEFENDANT: This ain't a Court.

THE COURT: ——of this trial.

THE DEFENDANT: This is bull shit.

THE COURT: If you continue with your outbursts, you will be removed from this Court room.

THE DEFENDANT: Remove me. Big Deal. I ain't interested in your Court room, flying your bombs and your bull shit. You want to bomb, you bomb it yourselves ——

THE COURT: May the record show that the defendant ——

THE DEFENDANT: ——or being your funky president.

THE COURT: ——has been removed from the Court room by the Sheriff and the Deputy Sheriff. This trial will continue without the presence of the defendant being present. [sic] "

As noted, both of these disturbances took place during the testimony of Dr. Paul Loeffelholz, an expert witness testifying in rebuttal for the State. Mr. Moore was excluded from the Court room during portions of both the direct and cross-examination of Dr. Loeffelholz. During Mr. Moore's absence, Dr. Loeffelholz gave the heart of his testimony: that Mr. Moore was not legally insane at the time of commission of the offense.

At the conclusion of the trial, the jury returned a verdict finding Mr. Moore guilty of first degree murder in connection with the death of his wife. The Iowa Supreme Court affirmed Mr. Moore's conviction in an opinion dated March 21, 1979 and reported at 276 N.W.2d 437 (Iowa 1979). The instant

Habeas Corpus proceedings followed.

The District Court for the Southern District of Iowa sustained Mr. Moore's petition of Writ of Habeas Corpus. The district court, applying the standards set forth in *Illinois v. Allen,* 397 U.S. 337 (1970), held that Mr. Moore's conduct was not as flagrant as that of the Defendant in *Allen.* The court also held that the warning given to Mr. Moore prior to his exclusion from the court room was not a full and fair warning. In reaching these conclusions, the court considered the fact that Mr. Moore "was in some measure a mentally disturbed person." *Moore v. Scurr,* 494 F.Supp. 1042, 1047 (S.D. Iowa 1980).

The Court of Appeals reversed the decision of the district court, substituting its own factual analysis for that of the district court. The Court of Appeals concluded that Mr. Moore had received an adequate warning prior to his exclusion. The Court of Appeals also concluded that Mr. Moore's conduct was flagrant enough to warrant his exclusion from the court room. Finally, the Court of Appeals held that the pre-trial competency determination established Mr. Moore's ability to effect a valid waiver of his Sixth Amendment right of confrontation.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT DISTINGUISHING BETWEEN COMPETENCY TO STAND TRIAL AND MENTAL CAPACITY TO WAIVE CONSTITUTIONAL RIGHTS.

It is long and well established that for a waiver of constitutional rights to be effective, there must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458 (1938). In concluding that Mr. Moore was unconstitutionally excluded from the court room, the district court relied in part upon the fact that "the petitioner was in some measure a mentally disturbed person . . ." *Moore v. Scurr,* 494 F.Supp. 1042, 1047, (S.D. Iowa

1980). The Court of Appeals, on the other hand, overlooked this factor, specifically holding that since a jury had determined Mr. Moore was competent to stand trial, "he was capable of effecting a valid waiver of his Sixth Amendment right of confrontation." *Scurr v. Moore,* 647 F.2d 854, 858 (1981). This conclusion is in direct conflict with decisions of this Court on that issue.

Justice Douglas' concurring opinion in *Illinois v. Allen,* 397 U.S. 337 (1970) expressed concern over this very issue, so easily dismissed by the Court of Appeals. Therein, Justice Douglas noted:

> "The fact that a Defendant has been found to understand 'the nature and object of the proceedings against him' and thus competent to stand trial does not answer the difficult question as to what a trial judge should do with an otherwise mentally ill defendant who creates a courtroom disturbance." *Allen, supra,* 397 U.S. at 351–52.

This Court's decision in *Drope v. Missouri,* 420 U.S. 162 (1975), expanded upon the reasoning behind Justice Douglas' concurrence in *Allen.* The defendant in *Drope* had attempted suicide the night after the first day of trial. As a result of his hospitalization, the trial proceeded to its conclusion without the defendant. In reversing the defendant's conviction, this Court noted that:

> "Even when a defendant is competent at the commencement of his trial, a trial Court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."

Drope expressly recognized the distinction expressly ignored by the Court of Appeals in the case at bar, stating that the trial court "was not informed by an inquiry into *either* his competence to stand trial *or* his capacity effectively to waive his right to be present." (Emphasis added). *Drope, supra,* 420 U.S. at 182–83. *See also, Westbrook v. Arizona,*

384 U.S. 150 (1966). This alarming conflict of law justifies the grant of certiorari to review the judgment below.

2. THIS COURT'S DECISION IN *ILLINOIS V. ALLEN* SHOULD BE UPDATED AND CLARIFIED TO PREVENT INCONSISTENT LOWER COURT DECISIONS.

Both lower federal courts, and the state supreme court, relied upon this Court's decision in *Illinois v. Allen,* 397 U.S. 333 (1970) as providing the applicable law. In its de novo review of the record, and acting as the "finder of fact" for purposes of appellate review, the district court held that Mr. Moore was unconstitutionally excluded from the court room under the *Allen* standards. Acting as appellate courts, the Iowa Supreme Court and the Court of Appeals reached an opposite conclusion. These three conflicting decisions were added to the list of nearly 600 cases which have relied upon *Allen* since decided more than 11 years ago. *Shepard's Citator,* United States Supreme Court Reports.

This Court held in *Allen* that:

> "A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the court room." *Allen, supra,* 397 U.S. at 343.

This holding has given rise to differences of opinion, between parties and courts, in three major areas.

A. Severity of Conduct

Prior to his exclusion in the case at bar, the Petitioner uttered a mere 57 words, some directed at the Court and others at the witness who was then testifying. These brief vocal statements, occuring on the 7th day of the trial, constituted the only incident of arguably disruptive in court behavior on the part of the Petitioner.

It is Petitioner's contention that his conduct was not so "disorderly, disruptive and disrespectful" as to constitute a waiver of his right to be present. The district court agreed, noting it could "find nothing in the record sufficient to conclude that Petitioner was opposed to the trial going on or that he intended to keep disrupting it so as to make it impossible to carry on the trial with him in the court room." *Moore v. Scurr,* 494 F.Supp. 1042, 1047 (S.D. Iowa 1980).

The Court of Appeals, relying upon the same record, and applying the same law, reached an opposite conclusion. The Court acknowledged that the Petitioner's conduct "may not have been as flagrant as that of *Allen*", but noted there was no need to "categorize Moore's conduct except to determine that it violated the dignity, order and decorum of court proceedings". *Scurr v. Moore, supra,* at 647 F.2d at 858. Such a conclusion on the part of the Court of Appeals is greatly at odds with conclusions of other courts holding that it is necessary to "decide whether Appellant's behavior at trial did rise to the level of misconduct described in *Allen.*" *Badger v. Cardwell,* 587 F.2d 968 (9th Cir. 1978).

B. Sufficiency Of Warning

It is Petitioner's contention that the single warning given to him prior to his exclusion from the court room was not a "fair warning" under the *Allen* standards. The district court agreed, concluding that the "Petitioner did not have the benefit of a full and fair warning, a concept which necessarily involves time to adequately reflect upon the possible consequences." *Moore v. Scurr, supra,* 494 F.Supp. at 1047.

The Court of Appeals again reached an opposite conclusion. In so concluding, the Court of Appeals adopted the reasoning of the Iowa Supreme Court that no "formalistic sequence of warnings" is required and that it is unnecessary for more than one warning to be given prior to excluding a disruptive defendant. *Scurr v. Moore,* 647 F.2d 854, 858 (1981).

This conclusion by the Court of Appeals is clearly in conflict with the decisions of this court and other lower federal courts requiring that a "full and fair" warning be given to a criminal defendant prior to his exclusion from the court room.

While the Petitioner does not necessarily contend that a trial court judge is required to follow some "formalistic sequence of warnings", such a sequence of warnings would probably be desirable *See,* for example, *State v. Sisco,* 169 N.W.2d 542 (Iowa 1969) (warnings prior to guilty plea); *Miranda v. Arizona,* 384 U.S. 436 (1966) (warnings prior to custodial interrogation). The Petitioner does, however, contend that the trial court judge in the case at bar failed to give a "full and fair" warning.

C. Knowing and Intentional Waiver

It is the Petitioner's contention that he lacked sufficient mental capacity to intentionally waive his constitutional right to be present in the court room. In reaching its decision, the district court recognized the significance of this factor, noting it was "especially mindful of the fact that the Petitioner was in some measure a mentally disturbed person, a fact conceded by counsel for respondent in oral argument." *Moore v. Scurr, supra,* 494 F.Supp. at 1047. The trial transcript is replete with evidence to support this fact.

The Court of Appeals once again reached an opposite conclusion, holding that since Petitioner had been determined competent to stand trial, he necessarily had the mental capacity to waive his constitutional right to be present. As noted above, this conclusion on the part of the Court of Appeals is in alarming conflict with decisions of this court clearly distinguishing between competency to stand trial and mental capacity to waive constitutional rights.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT DEFINING THE SCOPE OF FEDERAL COURT REVIEW IN 22 U.S.C. § 2254 HABEAS CORPUS PROCEEDINGS.

This Court held in *Townsend v. Sain,* 372 U.S. 293 (1963) that in habeas corpus proceedings, federal courts have "the power to receive evidence and try the facts anew."

Townsend, supra, 372 U.S. at 312. The Court recognized that habeas corpus hearings before federal district courts are not merely further appellate review of state court decisions, but rather are "original civil proceeding[s], independent of the normal channels of review of criminal judgments . . ." *Townsend, supra,* 372 U.S. at 312.

Following *Townsend,* Congress modified § 2254(d) to expressly incorporate the *Townsend* standards and accord limited res judicata effect to factual determinations made by state court judges. § 2254(d) now provides in pertinent part that:

> "In any . . . application for a Writ of Habeas Corpus . . . a determination . . . made by a state court . . . shall be presumed to be correct, unless . . . (8) the Federal court on a consideration of . . . the record as a whole concludes that such factual determination is not fairly supported by the record."

This "presumption of correctness" provided the basis for this Court's recent decision in *Sumner v. Mata,* _____ U.S. _____, 66 L.Ed.2d 17 (1981). However, in *Sumner* this Court continued to recognize "that even a single federal judge may overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question."

In the case at bar, the district court specifically recognized the "presumption of correctness" to be given to the state court factual determinations, noting, "in matters such as this, discretion attends the trial judge and great deference must be accorded to his decision." *Moore v. Scurr, supra,* 494 F.Supp. at 1047. Even after granting *"great* deference" however, the district court concluded, that "the record does not sustain the constitutionality of Petitioner's exclusion from a portion of his trial." *Moore v. Scurr, supra.* Under clearly defined standards of federal appellate review, unless these findings by the district court were "clearly erroneous" they should have been binding on the Court of Appeals, *See, Tyler v. Beto,* 301 F.2d 993 (5th Cir. 1968).

The Court of Appeals, however, apparently undertook

its own de novo review of the record and "disagree[d] with the conclusions of the district court." *Scurr v. Moore, supra,* 647 F.2d at 858. The decision of the Court of Appeals is thus in direct conflict with decisions of this court holding that "the federal court to which the [habeas corpus] application is made has the power to receive evidence and try the facts anew." *Townsend, supra,* 372 U.S. at 312

CONCLUSION

The case at bar presents the unique opportunity for this court to review and clarify 3 separate issues frequently arising in the context of criminal prosecutions. For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the 8th Circuit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of August, 1981, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Thomas D. McGrane, Assistant Attorney General, Hoover State Office Building, Des Moines, Iowa 50319, Counsel for the Respondent, I further certify that all parties required to be served have been served.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RICHARD A. MOORE,	)	
	)	
Petitioner,	)	CIVIL NO. 80-44-D
	)	
v.	)	
	)	
DAVID SCURR, Warden,	)	ORDER GRANTING WRIT
Iowa State Penitentiary,	)	OF HABEAS CORPUS
	)	
Respondent.	)	

This is a habeas corpus proceeding under 28 U.S.C. § 2254 brought by an inmate of the Iowa State Penitentiary at Fort Madison, Iowa, where respondent is the warden. Petitioner is serving a sentence of life imprisonment imposed on March 21, 1977, by a judge of the Iowa District Court after being found guilty by a jury of the crime of first degree murder. His conviction was affirmed by the Iowa Supreme Court, *State v. Moore*, 276 N.W.2d 437 (Iowa 1979). With the advice of the parties, the court has determined that an evidentiary hearing is unnecessary, *see* Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts, and the case is now fully submitted for decision upon the record, including a transcript of the trial, and briefs and oral arguments of counsel.

Because the issue raised in this proceeding was raised and resolved against petitioner in the criminal proceedings in the Iowa District Court and the Iowa Supreme Court, he has exhausted his state remedies. 28 U.S.C. § 2254(b).

GROUNDS FOR RELIEF

As grounds for relief, petitioner asserts that his exclusion from the courtroom during part of the testimony of an important witness for the prosecution deprived him of his right to confront that witness in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

FACTS

The material facts giving rise to plaintiff's claim for relief are undisputed.

On June 3, 1976, petitioner was charged by county attorney's information in Jasper County, Iowa, with the murder of his wife, Terri Williams Moore, in violation of section 690.1 of the 1975 Code of Iowa. On June 15 the court ordered the sheriff to deliver petitioner to the Iowa Security Medical Facility at Oakdale, Iowa, for psychiatric evaluation in order to determine petitioner's competency to stand trial and to determine petitioner's ability to form the intent necessary as an element of the offense charged against him. At the conclusion of the period of evaluation, a staff psychiatrist at the Security Medical Facility reported to the court that petitioner was competent to participate in judicial proceedings and that he had capacity to form the requisite intent at the time of the alleged offense.

Trial commenced on February 1, 1977, but the jury selection proceedings were interrupted when petitioner suddenly attempted to confess and plead guilty. After proceedings out of the presence of the jury the court determined that there was a reasonable doubt as to petitioner's sanity and ordered a trial by another jury to determine his competency to stand trial on the criminal charges. The competency trial jury found petitioner to be competent to stand trial, and the murder trial resumed on February 8. The jury returned the guilty verdict on February 23.

The primary issue in petitioner's murder trial was his defense of insanity.[1]

On the afternoon of February 16, the fifth day of the trial, the judge was advised that during the noon hour petitioner assaulted and injured a jailer who was returning him to the jail for the lunch hour. The judge was also advised that during petitioner's evaluation at the Security Medical Facility, he had assaulted persons there and had to be separated from other patients because of his violent conduct. The trial judge ordered that petitioner be restrained by a body belt and handcuffs to be placed inside petitioner's coat so that it would not be ascertainable by the jurors, and petitioner was so restrained during the rest of the trial.

On February 18, the seventh day of the trial, the state's principal expert witness on the insanity issue, Dr. Paul Loeffelholz, a psychiatrist and clinical director of the Security Medical Facility, testified. During his direct testimony, the following occurred:

> Q. What, if any, was Richard Moore's response when he was told that you didn't believe him?
>
> A. He became somewhat glum when he got those messages, irritable, demanding and made threats, and within a short time was demanding his discharge and if he wouldn't get discharged he would take a hostage and leave.

---

[1]Under Iowa law, the state must prove a defendant's sanity beyond a reasonable doubt when substantial evidence appears in the record raising an insanity fact issue. *State v. Thomas*, 219 N.W.2d 3 (Iowa 1974). Iowa applies the M'Naghten rule, *State v. Thomas, supra*, 219 N.W.2d at 5-6, that one is not guilty by reason of insanity if, "at the time of committing the act, the party accused was labouring under such a defective reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 10 Cl. & F. 210, 8 Eng.Rep. 722. At the time of petitioner's trial, these procedural and substantive provisions were applied under Iowa case law, but the substantive provision is now codified in section 701.4 of the Iowa Criminal Code.

THE DEFENDANT: You're a liar.

Dr. Loeffelholz continued at some length to complete his answer, and another question was asked and a short answer given, when the following occurred:

MR. CHALUPA: Your Honor, may we have a recess at this time?

THE DEFENDANT: I think – – take this Court and shove it.

THE COURT: Members of the Jury, we will be at recess until further notice.

After a 35 minute recess the trial resumed and Dr. Loeffelholz continued giving his direct testimony. After eight questions and answers the following occurred:

Q. Doctor, from the background I've given you earlier, in your testimony Mr. Moore has stated on repeated occasions that he works for the Denver Police Department and these – –

THE DEFENDANT: Martin down there, Lieutenant Callig down there, too.

THE COURT: Mr. Moore, will you please remain silent. We will maintain order during – –

THE DEFENDANT: This ain't a Court.

THE COURT: – – of this trial.

THE DEFENDANT: This is bullshit.

THE COURT: If you continue with your outbursts, you will be removed from this Court room.

THE DEFENDANT: Remove me. Big deal. I

ain't interested in your Court room, flying your bombs and your bullshit. You want to bomb, you bomb it yourselves – –

THE COURT: May the record show that the Defendant – –

THE DEFENDANT: – – or being your funky President.

THE COURT: – – has been removed from the Court room by the Sheriff and the Deputy Sheriff. This trial will continue without the presence of the Defendant being present.

With the petitioner absent from the courtroom, the direct examination of Dr. Loeffelholz continued to its conclusion 26 questions and answers later, and cross-examination proceeded through more than 65 questions and answers. A recess was then taken after which petitioner returned to the courtroom where he remained and behaved for the balance of the trial. Dr. Loeffelholz's testimony was concluded after the recess.

During petitioner's absence, Dr. Loeffelholz, on direct examination, testified in response to a hypothetical question that in his opinion the petitioner knew the nature and consequences of his act and knew the difference between right and wrong on the date of the offense, and testified as to personal observations of petitioner and other underlying facts that led him to his opinion.

LAW GOVERNING RIGHT OF CONFRONTATION

The Sixth Amendment to the Constitution of the United States provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *." Because this right of confrontation is a fundamental right it is made obligatory on the states by the due process clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400 (1965).

The right of confrontation means that the accused has a right to be present in the courtroom at every stage of his trial. *Illinois v. Allen,* 397 U.S. 337, 338 (1970); *Lewis v. United States,* 146 U.S. 370 (1872). However, this right is not absolute and may be lost by disruptive conduct. *Illinois v. Allen, supra; see Snyder v. Massachusetts,* 291 U.S. 97, 106 (1934).

Whether petitioner was denied his right of confrontation or lost the right by his conduct must be measured by the standards established by the United States Supreme Court in *Illinois v. Allen, supra.* The facts in *Allen* are important and are set out, *id.* at 339-41, as follows:

> The facts surrounding Allen's expulsion from the courtroom are set out in the Court of Appeal's opinion sustaining Allen's contention:
>
> > "After his indictment and during the pretrial stage, the petitioner [Allen] refused court-appointed counsel and indicated to the trial court on several occasions that he wished to conduct his own defense. After considerable argument by the petitioner, the trial judge told him, 'I'll let you be your own lawyer, but I'll ask Mr. Kelly [court-appointed counsel] [to] sit in and protect the record for you, insofar as possible.'
> >
> > "The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to

act as his lawyer. He terminated his remarks by saying, 'When I go out for lunchtime, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

"After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witnesses from the courtroom. The [petitioner] protested this effort on the part of his attorney, saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." 413 F.2nd, at 233-234;

After this second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel.

The Court, reversing the decision of the United States Court of Appeals for the Seventh Circuit, *United States ex rel. Allen v. Illinois,* 413 F.2d 232 (7th Cir. 1969), held that the trial judge did not commit legal error in excluding Allen from the courtroom. The Court made the following instructive observations.

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continued his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court *that his trial cannot be carried on with him in the courtroom.* Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Illinois v. Allen, supra, 397 U.S. at 343 (emphasis supplied).

Allen's behavior was clearly of such an *extreme and aggravated nature* as to justify either his removal from the

> courtroom or his total physical restraint. Prior to his removal he was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, and * * * the record demonstrates that Allen would not have been at all dissuaded by the trial judge's use of his criminal contempt powers. Allen was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner. Under these circumstances we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.

Id. at 346 (emphasis supplied).

> We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

Id. at 343-44.

After discussing various disadvantages in binding and gagging an obstreperous defendant, the Court stated: "However, in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here." *Id.* at 344.

After discussing some disadvantages in citing a disruptive defendant for contempt, the Court stated: "Nevertheless, the contempt remedy should be borne in mind by a judge in the circumstances of this case." *Id.* at 345.

It has been observed that the *Allen* standard "announces no *per se* rule of excludable conduct." *Badger v. Cardwell*, 587 F.2d 968, 971 (9th Cir. 1978). I agree. However, *Allen* does establish that a defendant in a criminal case cannot constitutionally be removed from the courtroom during his trial unless his "behavior was clearly of such an extreme and ag-

gravated nature," *see Illinois v. Allen, supra,* 397 U.S. at 346, that it "constituted sufficient grounds for concluding that the trial could not have proceeded fairly and efficiently so long as [the defendant] was present in the courtroom." *Badger v. Cardwell, supra,* 587 F.2d at 973. *Allen* also requires that fair warning of the consequences of continued misbehavior must be given, and if the defendant is removed he must be given assurances that he may return as soon as he agrees to conduct himself in an orderly manner. *Illinois v. Allen, supra,* 397 U.S. at 343; *Badger v. Cardwell, supra,* 587 F.2d at 973.

In matters such as this, discretion attends the trial judge and great deference must be accorded to his decision. *Illinois v. Allen, supra,* 397 U.S. at 343; *Badger v. Cardwell, supra,* 587 F.2d at 973. Nevertheless, it is this court's obligation to grant petitioner the writ of habeas corpus he seeks if the record fails to sustain the constitutionality of petitioner's exclusion from a portion of his trial. *Id.*

The record does not sustain the constitutionality of petitioner's exclusion from a portion of his trial. Petitioner's outburst was no doubt disruptive at the moment it occurred, but I find nothing in the record sufficient to conclude that petitioner was opposed to the trial going on or that he intended to keep disrupting it so as to make it impossible to carry on the trial with him in the courtroom. *See Illinois v. Allen, supra,* 397 U.S. at 343; *Badger v. Cardwell, supra,* 587 F.2d at 975. The very fact that petitioner had gone through seven days of the trial without interfering with its progress is strong evidence that he was not opposed to the trial process. *See Badger v. Cardwell, supra,* 587 F.2d at 975, and compare to the facts in *Illinois v. Allen, supra,* where the defendant disrupted the trial at the beginning and declared: "There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial," and "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this."

Furthermore, the single warning given to petitioner by the trial judge does not appear from the record to have been a

fair warning. The warning was given in the midst of a brief verbal exchange between the judge and the petitioner during petitioner's outburst. The apparent rapidity with which the words were exchanged and the fact that the sheriff and deputy sheriff apparently began removing defendant in the midst of this exchange without any instruction from the judge to do so lead me to conclude that petitioner did not have the benefit of a full and fair warning, a concept which necessarily involves time to adequately reflect upon the possible consequences. In reaching this conclusion of lack of fair warning I am especially mindful of the fact that the petitioner was in some measure a mentally disturbed person, a fact conceded by counsel for respondent in oral argument. *See Illinois v. Allen, supra,* 397 U.S. at 351-52 (Douglas, J., concurring).

Furthermore, petitioner was not given an assurance by the trial judge that he could return to the courtroom when he would agree to conduct himself in an orderly manner. *See Illinois v. Allen, supra,* 397 U.S. at 343, 346; *Badger v. Cardwell, supra,* 587 F.2d at 973.

As respondent readily concedes and as the Iowa Supreme Court found, *State v. Moore, supra,* 276 N.W.2d at 440, petitioner's conduct was not as flagrant as that involved in *Allen.* Nevertheless, it does not appear from the record in this case that the judge considered any means of dealing with the problem other than expulsion of the petitioner. He apparently did not consider contempt or gagging. More importantly, the judge made no effort to thoroughly explain to petitioner the need for decorum and the necessity of removing him if he continued to disrupt the trial and he gave petitioner no time to calm down and meaningfully absorb the warning and make a deliberate and reasoned choice. "Where constitutional rights of the accused are at stake, including the right to be present, a trial court must look for corrective measures that do least injury to these rights consistent with the preservation of an orderly court atmosphere." *Badger v. Cardwell, supra,* 587 F.2d at 975.

I am led to the conclusion that petitioner did not lose his right to be present during the examination of Dr. Loeffelholz and that his exclusion from the courtroom was a violation of his right of confrontation as guaranteed to him by

the Sixth and Fourteenth Amendments to the Constitution of the United States.

NOT HARMLESS ERROR

The respondent urges that any error in excluding petitioner from the courtroom was harmless beyond a reasonable doubt and that therefore the writ of habeas corpus sought by petitioner should not be issued.

"The burden of proving harmless error is a heavy one and the state must so prove beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)." *Blackwell v. Brewer,* 562 F.2d 596, 600 (8th Cir. 1977).

At petitioner's trial, the state had the burden of proving beyond a reasonable doubt that petitioner was not insane under the M'Naghten rule. *See* footnote 1, *supra.* It was during petitioner's exclusion from the courtroom that the principal witness for the state on the insanity issue, Dr. Loeffelholz, expressed his opinion that petitioner was sane under the M'Naghten rule and testified to some of the underlying facts which led him to that opinion. Thus, the testimony of Dr. Loeffelholz that was given during petitioner's exclusion from the courtroom went to the very heart of the murder case. *See Badger v. Cardwell, supra,* 587 F.2d at 977.

"Most believe that in some undefined but real way recollection, veracity and communication are influenced by face-to-face challenge." *United States v. Benfield,* 593 F.2d 815, 821 (8th Cir. 1979). More importantly, the right of confrontation provides the defendant in a criminal case with the opportunity to listen to the testimony of an opposing witness and relate any factual discrepancies to his lawyer, which the lawyer can then fully explore on cross-examination. In this connection, it is noteworthy that petitioner's outburst leading to his removal was precipitated by his disagreement with some factual testimony of Dr. Loeffelholz.

I am not persuaded beyond a reasonable doubt that the error was harmless.

ORDER FOR WRIT TO ISSUE

Accordingly, IT IS ORDERED that the petition for a

writ of habeas corpus is sustained.

IT IS FURTHER ORDERED that the writ for release from custody shall not issue for a period of sixty (60) days pending an appeal or the pursuit of a new trial by the state of Iowa. In the event of the pursuit of a new trial without appeal, the writ shall not issue until judgment is made in the last court in which it is finally submitted.

IT IS FURTHER ORDERED that in the event an appeal is filed by the state of Iowa within sixty (60) days of this order, the issuance of the writ shall be stayed pending the outcome of that appeal provided the appeal is diligently prosecuted by the state of Iowa.

IT IS FURTHER ORDERED that in the event of affirmance on appeal, issuance of the writ shall be stayed an additional sixty (60) days to permit the pursuit of a new trial by the state of Iowa, and in the event of the pursuit of a new trial after appeal, the writ shall not issue until judgment is made in the last court in which it is finally submitted.

DATED this 28th day of August, 1980.

HAROLD D. VIETOR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1917

David Scurr and The Attorney General of the State of Iowa,	)	
Appellants,	)	Appeal from the United States District Court
v.	)	for the Southern District of Iowa
Richard A. Moore,	)	
Appellee.	)	

Submitted: February 10, 1981

Filed: May 8, 1981

Before LAY, Chief Judge, STEPHENSON and ARNOLD, Circuit Judges.

STEPHENSON, Circuit Judge.

Petitioner Richard A. Moore, an inmate at the Iowa State Penitentiary in Fort Madison, contends that his exclusion from the courtroom during part of his criminal trial deprived him of his right of confrontation guaranteed by the Sixth and Fourteenth Amendments. Moore's writ of habeas corpus, brought under 28 U.S.C. § 2254, was sustained by the district court.[1] *Moore v. Scurr*, 494 F.Supp. 1042 (S.D. Iowa 1980). We reverse.

[1]The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa, presiding.

Moore was convicted of first degree murder in February 1977, for the slaying of his wife, Terri Williams Moore. His conviction was affirmed by the Iowa Supreme Court, *State v. Moore,* 276 N.W.2d 437 (Iowa 1979); which, among other issues, considered the precise question raised in this habeas petition.

I. BACKGROUND

Moore was charged with the murder of his wife in June 1976. He was initially sent to the Iowa Security Medical Facility at Oakdale, Iowa, for psychiatric testing. Following this evaluation, a staff psychiatrist from the Oakdale facility reported to the court that defendant Moore was competent to participate in judicial proceedings.

Jury selection in the murder trial began on February 1, 1977. On the next day, out of the presence of the jury, Moore confessed to the murder and attempted to plead guilty. The state district court ordered a competency trial pursuant to Iowa Code § 783.1 *et seq.* (1977),[2] which began the following day. After testimony by Moore, two psychiatrists and a psychologist from the Oakdale facility, and other witnesses, the jury in the Chapter 783 proceeding found that Moore was sane and competent to stand trial. Following this verdict, Moore withdrew his guilty plea. The murder trial resumed on February 8.

On February 16, the fifth day of trial, defendant Moore assaulted a jailer during the noon recess. The record discloses that the jailer suffered "brutal facial injuries" which required hospital treatment. That afternoon, the state requested that Moore be restrained during the remainder of the trial. The prosecution noted that Moore had assaulted persons at the Oakdale facility, that because of his violent outbursts and fighting he had been separated from the rest of the hospital population at Oakdale, and that one of the doctors there had described Moore as an "extremely dangerous person who en-

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[2]Chapter 783 was repealed as part of Iowa's criminal code revision which became effective January 1, 1978. This subject is now covered by Iowa Code § § 812.3-.5 (1981). *See* Note, Mental Ability of Accused to Stand Trial, 60 Iowa L. Rev. 586, 589 (1975).

listed the help of other patients * * * to escape."

The trial court ordered that the defendant be restrained by a body belt and handcuffs which were placed inside the defendant's coat so that they could not be seen by the members of the jury.

The preceding information furnishes a background to the verbal in-court outbursts by defendant Moore which led directly to his removal. On February 18, the seventh day of the nine day trial, the prosecution was examing Dr. Paul Loeffelholz, clinical director of the Oakdale facility. Dr. Loeffelholz was the state's principal witness concerning the insanity question which was the primary issue of the trial. *See Moore v. Scurr, supra,* 494 F. Supp. at 1043-44.

During the state's examination of Dr. Loeffelholz, the following exchange occurred:

Q. What, if any, was Richard Moore's response when he was told that you didn't believe him?

A. He became somewhat glum when he got those messages, irritable, demanding and made threats, and within a short time was demanding his discharge and if he wouldn't get discharged he would take a hostage and leave.

THE DEFENDANT: You're a liar.

A. With that, it was necessary that we exercise some control over a potential escape and Mr. Moore was placed in segregation pending his discharge. He was loud and obstreperous, demanding, verbally beligerent, abusive, and striking on the doors, was asked to terminate that and did not do so. He was advised to terminate it, otherwise we would have to restrain him so that he wouldn't potentially hurt himself by striking on things. He did not stop and accordingly we made an effort to subdue that striking to prevent abuse or destruction of property, and it took five adult men to subdue him, and Mr. Moore was discharged from that hospital after that

scene.

Q. Did Mr. Moore subsequently return to Oakdale Facility?

A. He did. He was brought out of the hospital then from June 30, 1976.

MR. CHALUPA: Your, Honor, may we have a recess at this time?

THE DEFENDANT: I think – – take this Court and shove it.

THE COURT: Members of the Jury, we will be at recess until further notice.

The court recessed for thirty-five minutes. Questioning began again and the transcript shows the following occurred:

Q. Doctor, from the background I've given you earlier, in your testimony Mr. Moore has stated on repeated occasions that he works for the Denver Police Department and these – –

THE DEFENDANT: Martin down there, Lieutenant Callig down there, too.

THE COURT: Mr. Moore, will you please remain silent. We will maintain order during – –

THE DEFENDANT: This ain't a Court.

THE COURT: – – of this trial.

THE DEFENDANT: This is bullshit.

THE COURT: If you continue with your outbursts, you will be removed from this Court room.

THE DEFENDANT: Remove me. Big deal. I ain't interested in your Court room, flying your bombs and your bullshit. You want to bomb, you bomb it yourselves – –

THE COURT: May the record show that the Defendant – –

THE DEFENDANT: – – or being your funky President.

THE COURT: – – has been removed from the Court room by the Sheriff and Deputy Sheriff. This trial will continue without the presence of the Defendant being present.

After the defendant was removed, the examination of Dr. Loeffelholz continued. After about twenty to thirty minutes of testimony, a short recess was taken. Following this recess, the defendant returned to the courtroom and remained there throughout the rest of the trial without incident. The testimony of Dr. Loeffelholz continued after the recess.

The state trial court denied Moore's motion for new trial based upon his exclusion from the courtroom. The Iowa Supreme Court, as noted, affirmed the conviction.

II. DISCUSSION

The removal of a disruptive defendant from the courtroom must be measured by the standards set forth in *Illinois v. Allen*, 397 U.S. 337 (1970). *Allen* stated that a defendant's Sixth Amendment right to confrontation assures the accused the right to be present in the courtroom at every stage of the trial. *Id.* at 338. The Court held, however, that this right can be forfeited by contumacious conduct. *Id.* at 343; *United States v. Cochran*, 475 F.2d 1080, 1083 (8th Cir.), *cert. denied*, 414 U.S. 833 (1973). *See Badger v. Cardwell*, 587 F.2d 968, 970-71 (9th Cir. 1978); *Bibbs v. Wyrick*, 526 F.2d

226, 227 (8th Cir. 1975), *cert. denied,* 425 U.S. 981 (1976). *See also* Fed. R. Crim. Pro., Rule 43(b) (2) (1975 amendment incorporating *Illinois v. Allen* principle).

In *Allen* the accused insisted on defending himself and during the voir dire examination "started to argue with the judge in a most abusive and disrespectful manner." The judge instructed appointed counsel to handle the remainder of the voir dire. Defendant Allen continued to disrupt the proceedings. He ended his remarks by threatening the judge, tearing his attorney's file and throwing the papers to the floor. The trial judge then said, "One more outbreak of that sort and I'll remove you from the courtroom." The defendant did not heed this warning and continued to make abusive statements. Allen was then removed from the courtroom upon the trial court's order. The jury was then selected without the defendant being present. *Illinois v. Allen, supra,* 397 U.S. at 339-40.

The state judge allowed Allen to return to the courtroom for the trial upon the condition that he would behave and not interfere with the introduction of evidence. Only minutes later, the defendant again interrupted the proceedings and promised to continue to do so. The trial judge then, for the second time, ordered that Allen be removed from the courtroom. Allen remained out of the courtroom during the presentation of the state's case-in-chief except for several brief appearances to be identified. At the close of the state's case, the trial court again allowed Allen to return on his assurance that he would conduct himself properly. Allen was permitted to stay in the courtroom for the remainder of the trial. *Illinois v. Allen, supra,* 397 U.S. at 341.

Faced with these facts, the Supreme Court observed that the right to confrontation was not absolute. And while noting that courts must indulge every reasonable presumption against the loss of a constitutional right, Justice Black, writing for a virtually unanimous court, stated:

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and dis-

> respectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. at 343 (footnote omitted).

Applying *Allen* to the case at bar, the district court held that Moore's conduct was not as flagrant as that of the defendant in *Allen* and that it found "nothing in the record sufficient to conclude that petitioner was opposed to the trial going on or that he intended to keep disrupting it so as to make it impossible to carry on the trial with [Moore] in the courtroom." *Moore v. Scurr, supra,* 494 F. Supp. at 1047-48. The district court concluded that the single warning given by the state trial judge was not a full and fair warning. The district court also noted that the state judge did not give the defendant an assurance that he could return to the courtroom when he agreed to conduct himself properly, that the state judge apparently did not consider other responses such as gagging or contempt, that the state judge did not thoroughly explain the need for decorum or give the defendant time to calm down and meaningfully absorb the warning. [3] *Id.*

We disagree with the conclusions of the district court. As the district court recognized, *Illinois v. Allen* states that the management of the courtroom is subject to the trial court's discretion and great deference must be accorded its decision. *Illinois v. Allen, supra,* 397 U.S. at 343. We hold that Moore's brief exclusion from the courtroom following the disruptive outbursts was within the discretion of the state trial court. Removal should be limited to cases urgently demanding that action, but the balancing of the defendant's confrontation

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[3] The district court also held that Moore's exclusion from the courtroom was not harmless error beyond a reasonable doubt. *Moore v. Scurr,* 494 F. Supp. 1042, 1048 (S.D. Iowa 1980). Because of our resolution of this appeal, we need not discuss this issue.

right with the need for the proper administration of justice is a task uniquely suited to the trial judge. Sufficient discretion must be granted to meet the circumstances of each case.

While Moore's conduct may not have been as flagrant as that of Allen, it certainly was sufficient to require a response from the state judge. Further, Moore's conduct was arguably more disruptive than that involved in *United States v. Cochran, supra,* 475 F.2d at 1083. However, we need not categorize Moore's conduct except to determine that it violated the dignity, order and decorum of court proceedings which *Illinois v. Allen* empowered judges to protect. The state judge in this case was faced with a disruptive and dangerous defendant who openly flaunted the court's authority to remove him.[4]

The warning in this case was similar in timing and content to the one used by the trial court in *Allen* just prior to the first removal. Both occurred in the middle of a heated exchange between the court and defendant. We agree with the Iowa Supreme Court that no "formalistic sequence of warnings" is required. *State v. Moore, supra,* 276 N.W.2d at 440. Nor is it necessary for more than one warning to be given, only one was given by the judge in *Allen* prior to the first removal. *Illinois v. Allen, supra,* 397 U.S. at 340. Further, it is clear from Moore's response – – "Remove me. Big deal." – – that he heard and understood the court's warning. The defendant here made it abundantly clear that he would not abide by the court's order.

In deciding that the warning was insufficient, the district court placed emphasis on the conclusion that the defendant

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[4]Moore argues that his out-of-court conduct—the assault on the jailer and his actions at the Oakdale facility—can not be relied upon to exclude him from the courtroom. We agree that to rely exclusively on out-of-court conduct would be improper. However, when such conduct is coupled with openly disruptive behavior *in* the courtroom, the out-of-court actions are part of the "totality of the circumstances" that the trial judge may consider in exercising its discretion. *Cf. State v. Okumura,* 570 P. 2d 848 (Hawaii 1978) (escape attempt during a recess was not sufficient to amount to a waiver of right to confrontation under *Illinois v. Allen* when there was no disruptive conduct in the courtroom).

"was in some measure a mentally disturbed person." *Moore v. Scurr, supra,* 494 F. Supp. at 1047. Again, we agree with the Iowa Supreme Court. A jury had determined that Moore had the mental capacity to appreciate the charge against him, understand the proceedings and help conduct his defense. Thus, he was capable of effecting a valid waiver of his Sixth Amendment right of confrontation. *State v. Moore, supra,* 276 N.W.2d at 441. There was no evidence, based on our reading of the record, that should have suggested to the trial judge that the defendant's status had changed since the Chapter 783 (mental competency) proceeding.

The district court also finds fault in that the state trial judge did not give Moore, at the time of his removal, an assurance that he could return to the courtroom if he behaved properly. We agree such a procedure is desirable, but *Illinois v. Allen* makes no such absolute requirement. The *Allen* Court stated only that once the confrontation right is lost it can be reclaimed as soon as the defendant is willing to conform his behavior consistent to the decorum required in judicial proceedings. *Illinois v. Allen, supra,* 397 U.S. at 343.[5] Moore was excluded from the courtroom for only a brief period and returned following the next recess. We think this procedure is eminently consistent with the language and the spirit of *Illinois v. Allen.*

The trial judge's apparent failure to consider other means of dealing with Moore is likewise insufficient grounds to sustain the writ. Although a number of methods are available, it is for the trial judge to decide. *See* ABA Project on Standards for Criminal Justice, The Function of the Trial Judge, § 6.8 at 88-90 (Approved Draft, 1972). We will provide relief only upon a showing of an abuse of discretion.

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[5]The ABA Project on Standards for Criminal Justice suggests that once removed the defendant should be returned to the courtroom at the commencement of each trial day, or more often. The trial judge could then, in open court and on the record, offer the defendant the opportunity to return to the courtroom conditioned upon his assurance of good behavior. ABA Project on Standards for Criminal Justice, The Function of the Trial Judge, § 68 at 88-89 (commentary) (Approved Draft, 1972).

We note that our decision in this case is not changed by the recent Supreme Court case of *Sumner v. Mata,* 101 S. Ct. 764 (1981). *Sumner,* which was handed down after the district court issued its opinion in the case at bar, held that federal courts should apply the presumption of correctness which is mandated by section 2254 to the factual determinations made by the State courts. *Sumner v. Mata, supra,* 101 S. Ct. at 769. The Court also held that a district court which sustains a writ under section 2254 should include in its opinion the reasoning which led it to conclude that any of the first seven factors listed in section 2254(d) were present or the reasoning which led it to conclude that section 2254(d) (8) was applicable. *Sumner v. Mata, supra,* 101 S. Ct. at 771. The district court in this case did not refer to section 2254(d). However, it did set out its reasons for holding that the state court abused its discretion in excluding the petitioner from the courtroom. The instant case concerns a question of law or at least a mixed question of law and fact.

The Iowa Supreme Court affirmed the district court after a review of the entire record and a careful analysis of the applicable law. We agree with the Iowa Supreme Court that the state trial court did not abuse its discretion in excluding Moore from the courtroom.

Reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

STATE of Iowa, Appellee,

v.

Richard A. MOORE, Appellant.

No. 60581.

Supreme Court of Iowa.

March 21, 1979.

Considered by REYNOLDSON, C.J., and REES, HARRIS, McCORMICK and LARSON, JJ.

REYNOLDSON, Chief Jusice.

Defendant appeals from judgment entered on jury verdict convicting him of first-degree murder, a violation of section 690.2, The Code 1975. We affirm.

May 20, 1976, the body of Terri Williams Moore was discovered near an interstate exit ramp near Lynnville. She had been shot in the head and back. During the investigation authorities discovered Terri at some time had undergone a sex-change operation. Investigation resulted in a murder charge against defendant Richard A. Moore, Terri's husband of one week. Moore, arrested at his home in Colorado, was returned to Iowa for trial.

Trial court interrupted jury selection when defendant suddenly attempted to confess and plead guilty. A competency proceeding was conducted pursuant to chapter 783, The Code. Defendant was found competent to stand trial. Trial resumed and defendant was convicted. From the record made the jury could find the following facts.

Defendant and Terri traveled to East Lansing, Michigan, for their honeymoon and stayed with Terri's friends. Several of these people knew Terri before her sex-change operation,

when her name was Frank Felice. While in East Lansing defendant and Terri often argued. One night defendant told one of his hosts he was "going to blow her away" and explained this meant "shoot her." The next morning the couple left for Denver, several days ahead of schedule. Terri, fearing for her safety, asked her friends to notify police if she didn't call in two days. Less than twenty-four hours later defendant shot Terri and left her and her possessions on a roadside. Defendant had the murder weapon in his car while in Michigan. He was carrying it when arrested.

On appeal defendant contends his removal from the courtroom after several verbal outbursts violated his constitutional right of confrontation. He also claims trial court abused its discretion in admitting murder scene and autopsy photographs and should have instructed, on its own motion, on diminished capacity.

I. Removal from courtroom.

On the seventh day of the nine-day trial defendant was removed from the courtroom for about thirty minutes because he insisted on disrupting the proceedings. Defendant asserts this violated his right to confront adverse witnesses, a right protected by the sixth amendment to the United States Constitution.

During a state psychiatrist's testimony the following occurred:

> Q. What, if any, was Richard Moore's response when he was told that you didn't believe him?
>
> A. He became somewhat glum when he got those messages, irritable, demanding and made threats, and within a short time was demanding his discharge and if he wouldn't get discharged he would take a hostage and leave.
>
> THE DEFENDANT: You're a liar.

Trial court made no comment. The witness finished his

answer and answered another question. Defense counsel requested a recess. Defendant said, "I think – take this court and shove it." Trial court ordered a recess that lasted thirty-five minutes.

Trial resumed and nine question later this exchange occurred:

Q. Doctor, from the background I've given you earlier, in your testimony Mr. Moore has stated on repeated occasions that he works for the Denver Police Department and these

THE DEFENDANT: Martin down there, Lieutenant Callig down there, too.

THE COURT: Mr. Moore, will you please remain silent. We will maintain order during–

THE DEFENDANT: This ain't a court.

THE COURT: – of this trial.

THE DEFENDANT: This is bullshit.

THE COURT: If you continue with your outbursts, you will be removed from this courtroom.

THE DEFENDANT: Remove me. Big deal. I ain't interest in your courtroom, flying your bombs, and your bullshit. You want to bomb, you bomb it yourselves.

THE COURT: May the record show that the defendant–

THE DEFENDANT: – or being your funky President.

THE COURT: –has been removed from the courtroom by the sheriff and the deputy sheriff. This

trial will continue without the presence of the defendant being present.

About twenty-five minutes later trial court ordered another recess. When court convened ten minutes later defendant was present in the courtroom. He was in attendance during the remainder of the trial without incident.

The controlling case is *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Acknowledging the confrontation clause of the sixth amendment guaranteed the right of an accused "to be present in the courtroom at every stage of this trial," the court held:

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

397 U.S. at 343, 90 S.Ct. at 1060-61, 25 L.Ed.2d at 359. A careful reading of *Allen* discloses that disruptive behavior constitutes a *waiver* of a constitutional right. *Accord, Taylor v. United States,* 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973) (accused's knowing and voluntary absence after first day of trial "waived" sixth amendment right to be present), *quoted with approval in State v. Johnson,* 243 N.W.2d 598, 603 (Iowa 1976); *see State v. Blackwell,* 238 N.W.2d 131, 134–137 (Iowa 1976); *State v. Snyder,* 223 N.W.2d 217, 222 (Iowa 1974).

Viewed as a waiver of constitutional rights, defendant's conduct has to meet certain criteria. His relinquishment of the right to be present at his trial must be knowing, intelligent and voluntary. *Brady v. United States,* 397 U.S. 742, 747–48, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747, 756 (1970). Courts indulge every reasonable presumption against waiver. *Collier v. Denato,* 247 N.W.2d 236, 239 (Iowa 1976). The burden is on the State to show a valid waiver by a preponderance of the evidence. *State v. Hilpipre,* 242 N.W.2d 306, 309 (Iowa 1976). Our review of trial court's decision to remove defendant

requires an assessment of the totality of the circumstances. *State v. Cullison,* 227 N.W.2d 121, 126 (Iowa 1975).

It is also true, however, that no formalistic sequence of warnings and record proof of defendant's knowledge of his confrontation right and that trial would continue in his absence is required in this area. Those contentions were rejected in *Taylor.* 414 U.S. at 19–20, 94 S.Ct. at 196, 38 L.Ed.2d at 177–178. The *Allen* and *Taylor* rules are found in revised rule 43 of the Federal Rules of Criminal Procedure and to a lesser extent in Iowa R.Crim.P. 25. Of course, defendant's right of confrontation does not carry a *right* to waive it. *State v. Davis,* 259 N.W.2d 812, 813 (Iowa 1977).

We examine this trial incident in light of the policy considerations expressed by the Supreme Court in *Allen,* 397 U.S. at 343, 90 S.Ct. at 1061, 25 L.Ed.2d at 359:

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

While in this case defendant's conduct was not as flagrant as that in *Allen,* he verbally challenged a witness's veracity, used vulgar language, and persisted in profane and disrespectful statements to the court.

Trial court's discretion extends to determining when an accused's conduct necessitates warning and ultimately removal. *Accord, United States v. Kizer,* 569 F.2d 506, 506–07 (9th Cir.), *cert. denied,* 435 U.S. 976, 98 S.Ct. 1626, 56 L.Ed.2d 71 (1978); *State v. Riles,* 355 So.2d 1312, 1313 (La. 1978); *People v. Harris,* 80 Mich.App. 228, 229–30, 263 N.W.2d 40, 40–41 (1977); *State v. Corriz,* 86 N.M. 246, 247, 522 P.2d 793, 795 (1974); *State v. Williams,* 11 Or.App. 227,

230, 501 P.2d 328, 330 (1972). This record discloses no basis on which to conclude trial court abused its discretion in determining defendant was prohibitively "disorderly, disruptive, and disrespectful." *Allen,* 397 U.S. at 343, 90 S.Ct. at 1060, 25 L.Ed.2d at 359. Contrary to defendant's belief, his earlier, out-of-court assult and injury of a jailer is relevant in weighing defendant's violent propensities and in determining whether the in-court disruption can be controlled without removal of the accused. *See People v. Booker,* 69 Cal.App.3d 654, 667–68, 138 Cal.Rptr. 347, 355-56 (1977).

Defendant argues the warning was inadequate because it was given only once and "in the middle of the exchange which ultimately led to [defendant's] exclusion." Defendant does not attack the warning's content per se, but asserts trial court made no "judicial determination" he was able to waive a constitutional right.

Allen makes no requirement of repeated warnings or a warning separated in time from "last-straw" conduct. No case providing otherwise is cited. Moreover, defendant cannot deny the warning was heard; he responded specifically to the warning itself. Nor do we overlook the significance of the thirty-five minute recess defense counsel requested on the heels of defendant's initial outburst. Although the record is silent on this point we cannot believe competent counsel would not advise his client to avoid this conduct. *Cf. State v. Reeves,* 254 N.W.2d 448, 493 (Iowa 1977) (waiver validating guilty plea may be based on information supplied by counsel as well as trial court). The only question remaining is whether trial court's warning was understood.

A jury determined defendant was competent to stand trial. Necessarily it found he had the mental capacity to appreciate the charge against him, understand the proceedings, and help conduct his defense. *See State v. Snethen,* 245 N.W.2d 308, 310 (Iowa 1976). We hold defendant was capable of effecting a valid waiver of his sixth amendment right of confrontation. His present contention that trial court should have made another "judicial determination that he understands his

rights and is competent to waive them," quoting *Lynch v. Baxley,* 386 F.Supp. 378, 389 (M.D. Ala.1974), is answered by the chapter 783 proceeding.

Defendant entirely fails to articulate what trial court failed to say or ascertain from him before finding he waived his confrontation right by his disruptive conduct. If defendant wishes to challenge the constitutionality of the procedure by which he was temporarily excluded from his trial, he must be specific. *See State v. Willis,* 218 N.W.2d 921, 923 (Iowa 1974) ("A constitutional challenge must be specific . . . ."). Our view of the entire record discloses no basis upon which to conclude defendant's waiver was invalid. Trial court did not violate defendant's sixth amendment right to confrontation.

II. Photographs.

Several color photographs of the murder scene, the autopsy, and Moore's personal effects were admitted into evidence. Defendant contends trial court abused its concededly "considerable" discretion, *see State v. Triplett,* 248 Iowa 339, 350, 79N.W.2d 391, 397–98 (1956), *cert. dismissed,* 357 U.S. 217, 78 S.Ct. 1358, 2 L.Ed.2d 1361 (1958), in admitting nine photos of the murder scene and autopsy. Timely objections to eight of these photos asserted they were repetitious, irrelevant, prejudicial, and inflammatory. Midway through presentation of this evidence defense counsel stipulated as to the cause of death.

These photos are not particularly gruesome or repetitive. State has the right, undiluted by stipulation, to present relevant evidence of the crime committed. *State v. Fryer,* 243 N.W.2d 1, 7 (Iowa 1976). Medical witnesses referred to the locale of the murder scene, the victim's position, and the presence of personal effects in testifying about defendant's sanity. Trial court did not abuse its discretion.

III. Diminished capacity.

Lastly, defendant seeks reversal of his conviction because trial court failed to instruct on the defense of diminished capacity. No request for this instruction was made. No objec-

tion was taken to its absence. No complaint was made in the motion for new trial.

> It is the trial court's duty to instruct a jury fully and fairly, even without request, but our adversary system imposes the burden upon counsel to make a proper record to preserve error, if any, in this factual circumstance by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in event they are refused.
>
> Defendant's failure to make known to the trial court before the instructions were given to the jury his wish to so instruct deprives him of a basis for successful appeal in this court for such failure to instruct.

State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978).

It is particularly appropriate in this case to require preservation of instructional error. A successful defense of diminished capacity would preclude only a first-degree murder conviction. *See State v. Jacoby,* 250 N.W.2d 828, 836 (Iowa 1977). Competent counsel could well have made a deliberate, tactical decision to present the jury with an all-or-none choice. *See State v. Veverka,* 271 N.W.2d 744, 749 (Iowa 1978).

AFFIRMED.

Opposition

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81-256

NO. _____

In The
Supreme Court of the United States
OCTOBER TERM, 1980

RICHARD A. MOORE,

Petitioner,

vs.

DAVID SCURR and THE ATTORNEY GENERAL OF THE STATE OF IOWA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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FORM STATEMENT

The requirements of Supreme Court Rule 34.1(a), (b), (d), (e) and (f) and the statement of the case are omitted as permitted by Supreme Court Rule 34.2.

REASONS FOR DENYING THE CERTIORARI

I.

The findings of the Court of Appeals that Petitioner was competent to, and did, waive his right to be present and confront all witnesses at his trial was not in conflict with prior decisions of this Court and was justified on the facts in this case.

Petitioner was charged with the murder of his wife on June 3, 1976. On June 15, 1976 he was ordered to be taken to the Iowa Security Medical Facility for psychiatric evaluation. A psychiatrist from there reported that Petitioner was competent to stand trial. On February 1, 1977, after jury selection had begun, Petitioner confessed his guilt to the judge and attempted to plead guilty. The Court ordered a competency hearing. Petitioner was found competent and trial began on February 8, 1977. On the fifth day of trial, Petitioner became disruptive. The first time a continuance was requested by Petitioner's counsel. After trial resumed Petitioner again became disruptive and after a warning was excluded from the trial for approximately 25 minutes. Petitioner asserted this enforced absence violated his right to confrontation and to be present at all times during his trial. The Iowa Supreme Court rejected this argument and affirmed the conviction. The United States District Court after considering the same contention granted habeas corpus relief, but the Eighth Circuit Court of Appeals reversed and reinstated the conviction.

The Court of Appeals found that Petitioner was competent to, and did, waive his right to confrontation and to

be present at all times during his trial. Petitioner asserts this is contrary to the prior decisions of this court, specifically *Drope v. Missouri*, 420 U. S. 162 (1975).

There is little question that the Petitioner in this case had some mental problems. The Court of Appeals found:

> "A jury had determined that Moore had the mental capacity to appreciate the charge against him, understand the proceedings and help conduct his defense. Thus, he was capable of effecting a valid waiver of his Sixth Amendment right of confrontation."

Scurr v. Moore, 647 F. 2d 854, 858 (8th Cir. 1981). The Court then went on and applied the same standard which this Court used in *Drope*:

> "There was no evidence, based on our reading of the record, that should have suggested to the trial judge that the defendant's status had changed since the Chapter 783 (mental competency) proceeding."

647 F. 2d at 858.

In *Drope*, this Court, specifically concluded that:

> "[T]hat record reveals a failure to give proper weight to the information suggesting incompetence which came to light during trial."

Drope, 420 U. S. at 179. Specifically the evidence in *Drope*, pre-trial, showed a person with a significant mental problem. At trial, the wife testified that the Defendant had tried to choke her the Sunday prior to trial. Then during the trial the defendant attempted suicide. The court ordered the trial to proceed in the defendant's absence despite his counsel's request for a mistrial.

There are significant differences between the instant case and *Drope*. The judge had a competency hearing

convened for Petitioner immediately before trial in which he was found to be competent. The Petitioner's actions in Court, while clearly disruptive, were not such as would indicate such a change in his mental ability to suggest that he had become unable, since the beginning of trial, to understand what was going on. Petitioner's counsel here also had access to him so that Petitioner could aid in the defense, and Petitioner returned to the court in a very short time. In addition, Petitioner in the instant case made an affirmative statement, "Remove me," indicating an awareness of the consequences of his actions, and a waiver of his right.

The Court of Appeals' finding of waiver was not contrary to *Drope* and was fully in accord with the finding of waiver in *Illinois v. Allen*, 397 U. S. 333 (1970). In *Allen*, as Justice Douglas noted, the Court was also dealing with a defendant with a mental problem. *Allen, supra*, 397 U. S. at 351-52 (Justice Douglas concurring). A mental problem does not necessarily make a person unable to exercise a valid waiver. This is particularly true where the mental problem has just been fully explored by the court *and* there is no indication of a change. The problem in *Drope* was obviously the unquestionable indication of a change in condition.

Petitioner has not shown a justification for certiorari review by this Court.

II.

The guidelines of Illinois v. Allen are sufficient to aid judges in selecting proper measures to protect the dignity, order and decorum of their courts against unruly defendants, and to protect the rights of those defendants, and there has been no significant variation among the circuits, or between state and federal courts in applying the Allen guidelines.

In *Illinois v. Allen*, 397 U. S. 333 (1970) this court held that a defendant can constitutionally be removed from the courtroom during his criminal trial if: (1) his behavior is disruptive; (2) he is warned his activities could result in his exclusion; and (3) he continues the disruptive behavior so his trial cannot be carried on. *Allen, supra*, 397 U. S. at 343. The Iowa Court in reviewing Petitioner's exclusion from his trial applied the *Allen* standard, with no significant variance and no apparent problem. *State v. Moore*, 276 N. W. 2d 437 (Iowa 1979). The Court of Appeals for the Eighth Circuit did likewise. *Scurr v. Moore*, 647 F. 2d 854 (8th Cir. 1981). The District Court decision in this case shows the danger of too strict a rule, in that it failed to allow the trial court the flexibility necessary, and allowed for by this Court in *Allen*. *Moore v. Scurr*, 494 F. Supp. 1042 (S. D. Iowa 1980).

Like the reviewing courts in the instant case, other courts have likewise recognized the flexibility needed by trial courts and have applied *Allen* to ensure both the necessary flexibility and the rights of defendants. *See e. g. Badger v. Cardwell*, 587 F. 2d 968 (9th Cir. 1978);

United States v. Munn, 507 F. 2d 563 (10th Cir. 1974), *cert. denied*, 421 U. S. 968 (1975); *United States v. Kizer*, 569 F. 2d 504 (9th Cir. 1978). There is no conflict which requires resolution by this Court. The Courts have shown their understanding of *Allen*, and have been able to apply it with relative ease. This case does not present a factual situation which would allow refinement of the *Allen* standard in a way to ease application, or to better ensure that courts can maintain decorum and protect defendants.

Certiorari review should be denied.

III.

The standard of review used by the Court of Appeals was correct.

The clearly erroneous standard of review does not apply where the District Court relied on transcripts and other documentary evidence in arriving at its decision. *Johnson v. Mabry*, 602 F. 2d 167 (8th Cir. 1979). *Taylor v. Lombard*, 606 F. 2d 371 (2d Cir. 1979). In the instant case the District Court did rely on documents from state court only, except for some brief professional statements from Petitioner's counsel. The Circuit Court is therefore free to make its own factual determination.

As to so-called mixed questions or the application of constitutional principles to the facts as found, it is the duty of the Court of Appeals to independently evaluate the record. *Irvin v. Dowd*, 366 U. S. 717, 723 (1961). The Court of Appeals in this case reviewed the record and the application of constitutional principles according to the established rules. Certiorari review of this question is unnecessary.

CONCLUSION

The writ of certiorari should be denied and the petition dismissed.

Respectfully submitted,

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